Supreme Court, U.S.
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No. 92-833

In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does a groundless criminal prosecution, initiated and pursued by a law enforcement officer without an objectively reasonable belief in probable cause, infringe liberty protected by substantive due process and provide a basis for an action pursuant to 42 U.S.C. §1983?

PARTIES TO THE PROCEEDINGS

The Petitioner is Kevin Albright. Respondents are Detective Roger Oliver and the City of Macomb, Illinois.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., 1a-12a) is reported at 975 F.2d 343. The opinion and order of the district court (Pet. App., 13a-26a) are not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (Pet. App., 27a-28a), was entered September 14, 1992. The petition for a writ of certiorari was filed on November 12, 1992.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitution, Amendment IV:

> "[N]o warrant shall issue, but upon probable cause, supported by oath or affirmation . . . . "

B. United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . "

C. United States Constitution, Amendment XIV, §1:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . . "

D. 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

On June 26, 1990, Petitioner Kevin Albright brought this action under 42 U.S.C. §1983 against Respondents, Detective Roger Oliver of the Macomb, Illinois police department and the City of Macomb, Illinois. (J.A. 1). He alleged that by initiating and pursuing a criminal prosecution against him without probable cause or an objectively reasonable belief in probable cause, respondents deprived him of substantive rights secured by the Due Process Clause of the Fourteenth Amendment. Pet. App., 35a-68a.

The District Court dismissed Albright's §1983 action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. App., 13a-26a, 34a. The Court of Appeals affirmed. Pet. App., 1a-12a, 27a-28a, 975 F.2d 343.

The complaint[1] alleged that in March, 1987, Veda Moore, who had recently been released from a rehabilitation hospital for a cocaine addiction, asked Detective Oliver for police "protection" from a drug dealer who was threatening her for cocaine debts. Pet. App., 38a. Although Detective Oliver knew or should have known of Moore's addiction and recent hospitalization, he offered Moore police protection on the condition that she serve as an informant by making purchases of controlled substances. Pet. App., 38a-39a.

Detective Oliver did not direct Moore to individuals whom he suspected or had probable cause to believe

[1] Pet. App., 35a-68a. As the district court dismissed pursuant to Rule 12(b)(6), all well pleaded allegations are accepted as true. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

were engaged in illegal activity. Pet. App., 39a-40a. Instead, he told her to make purchases from people she identified as engaged in such activity. Pet. App., 39a-40a. Detective Oliver gave Moore money with which to make the purchases and agreed to pay her $50 to $75 for each purchase of a controlled substance that she reported. Pet. App., 39a.

The complaint alleged that over the spring and summer of 1987, Moore represented to Oliver that she purchased controlled substances from over 50 separate individuals. Pet. App., 39a-40a. All the resulting prosecutions were dismissed without convictions. Pet. App., 40a.

On July 17, 1987, Moore delivered to Detective Oliver a substance that she reported she had purchased as cocaine from one John Albright, Jr. in Room 212 of the Pace Hotel, a student and transient hotel in Macomb. Pet. App., 40a-41a. Detective Oliver submitted the substance to the police laboratory for analysis. Pet. App., 40a. On September 2, 1987, the laboratory reported that the substance was baking powder. Pet. App., 40a. Nevertheless, on September 10, 1987, without any further investigation, Detective Oliver caused a grand jury to indict John Albright, Jr. for the Illinois felony of selling a "look-alike substance,"[2] and obtained a warrant for the arrest of John Albright, Jr. on the indictment. Pet. App., 40a-41a.

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[2] *Ill.Rev.Stat.* Ch. 56½ §1404(b) provides: "It is unlawful for any person knowingly to manufacture, distribute, advertise, or possess with intent to manufacture or distribute a look-alike substance."

On September 28, 1987, three months after Moore's report and 18 days after the indictment, Detective Oliver went to the home of John Albright, Jr. to arrest him. Pet. App., 41a. Albright's wife told Detective Oliver that Albright was a retired registered pharmacist over 60 years of age and not the type of person who would likely have dealt with Moore or sold her a substance represented as cocaine from a room in a student and transient hotel. Pet. App., 41a. Mrs. Albright told Detective Oliver that the Albrights had two sons, Kevin and John David Albright. Pet. App., 41a.

Detective Oliver realized he had made a mistake and assumed the person he wanted must be John David Albright. Pet. App., 41a-42a. Without further investigation, he scratched the name of John Albright, Jr. from the arrest warrant and replaced it with the name of John David Albright. Pet. App., 41a-42a.

John David Albright had been living and working in Chicago since September, 1986. Pet. App., 42a. On October 1, 1987, upon learning of the warrant for his arrest, John David Albright traveled 200 miles to Macomb from Chicago and advised Detective Oliver that on July 17, 1987, he was living in Chicago and was not in Macomb. Pet. App., 42a.

Detective Oliver telephoned Moore who, by that time, lived in Florida and told her that neither John Albright, Jr. nor John David Albright could have been the person who made the July 17 sale. Pet. App., 42a. Detective Oliver suggested to Moore that it might have been John David's brother, Kevin, from whom she made the purchase. Pet. App., 42a. Moore agreed. Pet. App.,

42a-43a. Without any further investigation, Detective Oliver scratched the name of John David Albright from the arrest warrant and replaced it with the name of Kevin Albright. Pet. App., 44a.

Detective Oliver then, on October 16, 1987, attested to a criminal information charging that on July 17, 1987, Kevin Albright had sold a "look-alike substance" to Moore, and had an arrest warrant issued for Kevin Albright, [3] Pet. App., 43a. Petitioner Kevin Albright surrendered and advised Detective Oliver that he was in Macomb on July 17, 1987, but did not sell anything to Moore. Pet. App., 44a. Detective Oliver placed Albright under arrest and required that he post bond of $3,500. Pet. App., 44a. Albright did that by paying 10% of that sum to the Illinois Circuit Court Clerk.[4] Pet. App., 44a. A

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[3] In Illinois when the prosecution of a felony is begun by the filing of an information, the court is required to "immediately issue a warrant for the arrest [of the person charged]." *Ill.Rev.Stat.* Ch. 38 §111-2(d). Thereafter, a preliminary hearing is required to determine "if from the evidence that appears there is probable cause to believe an offense has been committed . . . ". *Ill.Rev.Stat.* Ch. 38 §109-3.

[4] *Ill.Rev.Stat.* Ch. 38 §110-7(a) and (f) provide in relevant part as follows: "The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.00 . . . When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited." See *Schilb v. Kubel*, 404 U.S. 357 (1971).

standard condition of his bond prohibited him to travel outside the state of Illinois without leave.[5] Pet. App., 44a. Albright retained counsel to defend him against the felony charge. Pet. App., 45a, 48a.

On January 5, 1988, Detective Oliver testified at a preliminary hearing that Kevin Albright sold the "look-alike substance" to Moore on July 17, 1987. Pet. App., 45a-46a. Detective Oliver did not bring to the court's attention his testimony four months earlier to the grand jury that John Albright, Jr. had sold the same "look-alike substance" to Moore on July 17; that he had accused John David Albright of the same offense; that Moore had a cocaine addiction; or that he was unable to corroborate any of the information she had given him, including the nature of the substance. Pet. App., 46a. The court found probable cause to require Albright to stand trial. Pet. App., 46a. The case received widespread media coverage falsely associating Albright with drug dealing. Pet. App., 46a.

In January, 1988, Moore was again hospitalized for her cocaine addiction. Pet. App., 46a. On June 29, 1988, the court dismissed the criminal action on the ground the charge did not state an offense. Pet. App., 46a.

The district court granted respondents' motion to dismiss on the ground that the complaint did not state a

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[5] *Ill.Rev.Stat.* Ch. 38 §110-10(a)(3) provides: (a) "If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will . . . (3) Not depart this State without leave."

claim under §1983. Pet. App., 18a-20a, 22a-23a. The district court reasoned that because there is no constitutional right to a *"finding"* of probable cause, there is no §1983 action for initiating a prosecution without probable cause. Pet. App., 20a. The district court found that Albright "must point to some other distinct constitutional deprivation to maintain" the §1983 action. Pet. App., 19a. The district court also held that Detective Oliver was entitled to a defense of qualified immunity, Pet. App., 24a, and that the complaint failed to allege facts sufficient to support municipal liability against the city of Macomb. Pet. App., 24a-25a.

In affirming, the court of appeals relied on *Paul v. Davis*, 424 U.S. 693 (1976), to hold that prosecution without probable cause is a constitutional tort actionable under §1983 only if accompanied with incarceration or loss of employment or some other "palpable consequences". Pet. App., 6a-7a; 975 F.2d at 345-46. In addition, citing *Hudson v. McMillian*, 112 S.Ct. 995, 1000 (1992), the court of appeals decided that

> "in the absence of incarceration or other palpable consequences, we do not think it [prosecution without probable cause] should be actionable as a constitutional wrong. . . . [J]ust as in the garden-variety public officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest."

Id., Pet. App. 8a; 975 F.2d at 346-347. The court of appeals did not reach the other issues addressed by the district court.

SUMMARY OF THE ARGUMENT

1. The constitutional violation alleged in this case is the liberty to be free from criminal prosecution except upon probable cause protected by substantive due process. This Court has long assumed that due process requires probable cause for a criminal prosecution. *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). That is true even though the Court has held that the Constitution does not require the states to enforce that requirement with either a grand jury or a preliminary hearing procedure. *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975). The probable cause standard for a prosecution plays a vital role in protecting citizens from unfounded charges of crime, which bring to bear the prosecutorial forces of organized society in the most severe exercise of power by a government over its citizens. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). It is a minimal standard that broadly accommodates the state interest in legitimate criminal prosecution. *Gerstein v. Pugh, supra*. Prosecution without probable cause, however, is the paradigm of arbitrariness in the abuse of governmental power.

2. Section 1983 provides a remedy against such an unconstitutional abuse of state power. *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1066 (1992). Because the action is based on a Constitutional violation – the freedom from prosecution except upon probable cause protected by substantive due process – it vindicates only a right of constitutional dimension and not a "garden variety" state law tort. *Collins v. Harker Heights, supra; Daniels*

v. Williams, 474 U.S. 327, 331 (1986). Because the constitutional violation involves substantive rather than procedural due process, it is complete at the time it occurs – and cannot be corrected by any subsequent procedure. *Collins v. Harker Heights, supra*. Thus the §1983 remedy is not affected by the circumstance that the state might provide a tort law remedy in the form of a malicious prosecution action. *Monroe v. Pape*, 365 U.S. 167, 172 (1961). The §1983 action is supplementary to the state remedy. *Id*.

By operation of qualified immunity, no law enforcement officer is subject to a §1983 suit unless the officer initiated or pursued a criminal prosecution not only without probable causes but also without an objectively reasonable belief in probable cause. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Malley v. Briggs*, 475 U.S. 335, 340-342 (1986). That qualified immunity defense provides ample protection to capable law enforcement officers acting reasonably while preserving an important remedy for an innocent person subjected to unfounded criminal prosecution initiated and pursued unreasonably without probable cause. *Malley v. Briggs, supra*.

ARGUMENT

I.

THE INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE CONSTITUTE ARBITRARY GOVERNMENTAL CONDUCT WHICH VIOLATES THE DUE PROCESS CLAUSE.

A.

THE PROBABLE CAUSE STANDARD IS ESTABLISHED BY THIS COURT'S PRECEDENTS AND OUR NATION'S HISTORY AND TRADITIONS AS THE SUBSTANCE OF THE DUE PROCESS PROTECTION AGAINST ARBITRARY INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." This Court has held that the Due Process Clause contains both substantive and procedural protections. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The issue in this case arises under substantive due process, which is " 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884).[6]

[6] Other formulations of substantive due process protection include, "prevent[ing] the government from engaging in conduct that 'shocks the conscience' ", *United States v. Salerno, supra*, 481 U.S. at 746, quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), or "interfering with rights 'implicit in the concept of

Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, ___ U.S. ___, 61 L.W. 4237, 4240 (1993) (emphasis in original). "[B]y barring certain government actions regardless of the fairness of the procedures used to implement them . . . [due process] serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels v. Williams, supra*, 474 U.S. at 331; see also *Davidson v. Cannon*, 474 U.S. 344, 347-348 (1986); *Martinez v. California*, 447 U.S. 277, 282 (1980).

In *In Re Winship*, 397 U.S. 358, 364 (1970), the Court held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . . " In reaching that result, the Court reviewed the history of the reasonable doubt standard in this country, its acceptance in common law jurisdictions, the expressions in opinions of this Court assuming that it is constitutionally required, and its role in the American scheme of criminal justice. See also *Youngberg v. Romero*, 457 U.S. 307, 315 (1982); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). " 'Substantive due process' analysis must begin with a careful description of the asserted right. . . . " *Reno v. Flores, supra*, 61 L.W. at 4240. The right must be both

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ordered liberty' ", *Salerno, supra*, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

fundamental and "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). All of the circumstances that persuaded the Court in *Winship* to hold that the Due Process Clause includes the requirement of proof beyond a reasonable doubt for a criminal *conviction* compel the conclusion that that Clause also includes the requirement of probable cause for formal initiation and pursuit of a criminal *prosecution*.

This Court has often recognized the requirement of probable cause for a criminal prosecution. As early as 1851, the Court observed that an action for malicious prosecution would lie where a "prosecution has been carried on without a probable cause." *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851). More recently in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), and again in *Wayte v. United States*, 470 U.S. 598, 607 (1985), the Court said:

> In our system, *so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute*, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

(Emphasis added).

In *United States v. Marion*, 404 U.S. 307, 320 (1971), the Court equated prosecution with arrest ("whether he is free on bail or not") and said that "the Government must assert probable cause to believe the arrestee has committed a crime." See also *United States v. Lovasco*, 431 U.S.

783, 791-792 (1977) (explaining why it would be unacceptable to require prosecutors to institute "immediate prosecution upon probable cause," that is, "as soon as they are entitled to do so"); *Hoffa v. United States*, 385 U.S. 293, 310 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction").[7]

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[7] The Courts of Appeals have generally held or assumed that the Due Process Clause requires probable cause for a prosecution. E.g., First Circuit: *Carey v. City of Fall River*, 870 F.2d 40, 40 (1st Cir. 1989) ("Because there was no clear lack of probable cause, defendants cannot be held liable for violating plaintiff's substantive due process rights on a malicious prosecution theory"); but see, *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990) (Due process violation must be "egregious"); Second Circuit: *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991) ("The right not to be arrested or prosecuted without probable cause has, of course long been a clearly established constitutional right"); Third Circuit: *Rose v. Bartle*, 871 F.2d 331, 352 (3d Cir. 1989); Fourth Circuit: *Goodwin v. Metts*, 885 F.2d 157, 159, 160 n.1 (4th Cir. 1989); Fifth Circuit: *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254, 258-260 (5th Cir. 1984) ("[I]t is difficult for us to conceive a notion more repugnant to settled ideas of due process than one that the state prosecutor need have no basis whatever for criminal charges – even trivial ones – but may without constitutional disapproval subject whomever he wishes to whimsical prosecution"); see also *Saunders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992); Sixth Circuit; *Coogan v. City of Wixon*, 820 F.2d 170, 174-175 (6th Cir. 1989) ("Plaintiff failed to establish the absence of probable cause," so no constitutional violation); but see, *Dunn v. Tennessee*, 697 F.2d 121, 122 (6th Cir. 1982) (only if "egregious"); Seventh Circuit: *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Accepted concession of both parties); Tenth Circuit *Robinson v. Maruffi*, 895 F.2d 649, 657 (10th Cir. 1990) ("[D]efendants' conduct defiled the investigation, the grand jury proceedings and trial, and was so outrageous as to deny Robinson his constitutional right to a proper probable cause determination.")

The Court has held that the standard of probable cause governs the decision of a grand jury in its performance of its "ancient role . . . of determining if there is probable cause to believe a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972); accord, *United States v. Calandra*, 414 U.S. 338, 343 (1974) ("probable cause"); see also, *Stirone v. United States*, 361 U.S. 212, 218 n.2 (1960) ("upon just grounds"); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) ("upon reason"); *Hurtado v. California*, 110 U.S. 375, 390 (1962) ("upon reason"); *Hurtado v. California*, 110 U.S. 516, 522 (quoting Massachusetts Chief Justice Shaw in *Jones v. Robbins*, 8

Only *Wheeler v. Cosden Oil and Chemical Co.* devoted extensive discussion to the issue. The other decisions largely accepted the proposition in the course of determining whether Section 1983 provides a remedy. In the decision below, for example, the Seventh Circuit assumed but did not discuss that a constitutional prosecution may be initiated only upon probable cause.

The Eighth Circuit has said that "malicious prosecution can form the basis of a Section 1983 action only if the defendants' conduct also infringes some provision of the Constitution or federal law," *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) without discussing whether it violates substantive due process. The Ninth Circuit requires an intent to deprive the accused of equal protection. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988); *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). These decisions appear, however, to confuse the standard for a damages claim for the violation under 42 U.S.C. §1983 with the constitutional standard itself.

Gray 329, that a grand jury indictment requires "probable cause").

Similarly, the Court has long recognized that the probable cause standard governs prosecutions without the grand jury procedure. *Hurtado v. California*, 110 U.S. 516, 538 (1884). The minimal standard in all jurisdictions for the decision to bind a defendant over for a felony is " 'probable cause.' " F.W. Miller, PROSECUTION 83 (Little, Brown 1969). As the Court held in *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975): "The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt."

In *United States v. Lovasco*, 431 U.S. 783, 791 (1977), the Court observed that "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause." See ABA Model Rules of Professional Conduct, Rule 3.8(a) (2d ed. 1992); see also Illinois Code of Professional Responsibility, Rule 7-103(a) ("probable cause").

Thus, the Court has long assumed that the requirement of probable cause for a prosecution is as much a part of due process as the requirement of proof beyond a reasonable doubt for a conviction. That assumed requirement "dates at least from our early years as a Nation." *In Re Winship, supra*, 397 U.S. at 361. It is accepted in all the states as the standard for a prosecution, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-362. "Expressions in many opinions of this Court indicate that

it has long been assumed that" probable cause to initiate a criminal charge is constitutionally required. *Id.* at 362.

Moreover, the requirement of probable cause for a prosecution "plays a vital role in the American scheme of criminal procedure." *Id.* at 363. It is "indispensable to command the respect and confidence of the community in applications of the criminal law." *Id.* at 364. The long prevailing standard of probable cause is the bulwark "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The requirements of probable cause to prosecute and of proof beyond a reasonable doubt to convict are twin pillars that safeguard the security of the citizenry from oppressive governmental abuse of the power of the criminal law and that combine to provide "concrete substance for the presumption of innocence." *Id.* at 363. Cf. *Ingraham v. Wright*, 430 U.S. 651, 672-673, n. 41, 42 (1977).

The most severe exercise of power by a government over its citizens lies in the initiation and pursuit of a criminal prosecution:

> "The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society . . . . "

Kirby v. Illinois, 406 U.S. 682, 689-690 (1972). The invocation of criminal process pits the interest of the state in "enforcing the law in the community's protection," *Brinegar v. United States, supra*, 338 U.S. at 176, against the

"interest[s] of transcending value . . . a criminal defendant [has in] his liberty." *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The commencement of a prosecution "may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). A criminal prosecution inherently limits the liberty of the accused: "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, association and participation in unpopular causes." *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967). "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). "Anxiety and concern" inevitably accompany public accusation "from uncertainties in the prospect of facing public trial." *Strunk v. United States*, 412 U.S. 434, 439 (1973); *United States v. Ewell*, 383 U.S. 116, 120 (1966)."

A criminal prosecution brings to bear

> "the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987). Therefore, for an official formally to invoke this severe power with a baseless accusation of crime is the paradigm of arbitrariness and oppression in the abuse of governmental power. Such action could serve no legitimate or rational governmental purpose.

In addition, prosecution without probable cause unreasonably puts an accused at risk of wrongful conviction. The requirement of proof beyond a reasonable doubt is the ultimate protection against conviction of the innocent. That protection, however, is not always adequate. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) ("A properly instructed jury may . . . convict . . . when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . .") Hence, the courts may encounter convictions based on constitutionally insufficient evidence. See, *Hudson v. Louisiana*, 450 U.S. 40 (1981); *Greene v. Massey*, 437 U.S. 19 (1978); *Burks v. United States*, 437 U.S. 1 (1978); see also Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan.L.Rev. 21 (1987); Rattner, *"Convicted But Innocent,"* 12 Law and Human Behavior 283 (1988); Yant, PRESUMED GUILTY (Prometheus, 1991). Therefore, probable cause to prosecute is a sentinel of the presumption of innocence in the service of the ultimate protection of the innocent.

For those fundamental reasons the freedom from prosecution except upon probable cause is a right that is "implicit in the concept of ordered liberty."[8] *Palko v.*

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[8] One of the detested procedures of the infamous Star Chamber was the oath "ex officio mero" by which a judge

Connecticut, supra, 302 U.S. at 319. It would be shocking to the country if the Court were to abrogate the assumed constitutional safeguard of probable cause for a criminal prosecution. It is as "important in our free society" that every individual going about his or her affairs have confidence that the government cannot bring criminal charges without probable cause as it is that the government cannot convict without proof beyond a reasonable doubt. *Winship, supra,* 397 U.S. at 364.

Both the right to be free from conviction except on proof beyond a reasonable doubt and the right to be free from prosecution except upon probable cause are substantive rather than procedural in nature, though part of the process of criminal justice. The requirement of proof beyond a reasonable doubt may spawn procedural requirements, such as the content of a trial court's instructions to the jury or the allocation of the burden of proof at trial. *Mullaney v. Wilbur,* 421 U.S. 684 (1975). But it is itself a substantive safeguard.

Thus, even if a trial proceeds with all the procedural requirements and the trial judge properly instructs the jury on the requirement of proof beyond a reasonable

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summoned an accused before the Court by virtue of his office as judge without regard to the nature or strength of the accusations against him. E.W. Cleary, *McCormick's Handbook of the Law of Evidence;* 244 (2d ed. West 1972); 8 J.H. Wigmore, *Evidence in Trials at Common Law* 275 (Little, Brown 1961); Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination,* 10 Vand. L. Rev. 485, 486-487 (1957). In the inquisitorial system of the Star Chamber the proceeding "ex officio mero" "became a favorite one for heresy trials." Wigmore, *supra.*

doubt, an appellate court will set aside a conviction if it determines that the evidence did not measure up to the substantive standard. *Jackson v. Virginia,* 443 U.S. 307, 317-318 (1979); *Thompson v. City of Louisville,* 362 U.S. 199, 205-206 (1960). The remedy for breach of the substantive requirement of conviction only upon proof beyond a reasonable doubt is not to remand for correction or any perceived procedural deficiency, but to dismiss without any further proceedings, not because it is always unconstitutional to retry a defendant after a reversal of his conviction, for it is not, *United States v. Ball,* 163 U.S. 662, 672 (1892), but because it is always unconstitutional to obtain a conviction with a substantively inadequate basis. Cf. *DeShaney v. Winnebago County,* 489 U.S. 189, 195 (1989).

The requirement of probable cause for a criminal prosecution is of the same substantive character. It is not always unconstitutional for a law enforcement officer to initiate a criminal prosecution but it is always unconstitutional for the officer to do so without probable cause. Even if the officer follows all the proper procedures,[9] if the officer lacks probable cause for the prosecution it violates substantive due process. If the officer lacks probable cause yet obtains the approval of a magistrate or a prosecutor for a warrant, or at a preliminary hearing, or the indictment of a grand jury, the officer has committed a violation of substantive due process, nonetheless.[10] Cf.

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[9] Petitioner does not challenge the Illinois procedures for initiating and processing criminal charges.

[10] As explained in Argument II below, by operation of qualified immunity, an officer would not be liable under §1983

Malley v. Briggs, 475 U.S. 335, 340-342 (1986). A judicial "probable cause *determination* is not a constitutional prerequisite to the charging decision," *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975) (emphasis added), but probable cause is. No matter the extent of the procedure, substantive due process prohibits prosecution without probable cause.

B.

THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD AND THE FIFTH AMENDMENT'S GRAND JURY CLAUSE SUPPORT THE DUE PROCESS REQUIREMENT OF PROBABLE CAUSE FOR A PROSECUTION.

The probable cause standard is traditional, familiar and flexible. It is a minimal standard that affords ample discretion for legitimate prosecution decisions. Most officials would prefer to have evidence exceeding the probable cause standard before deciding to initiate a prosecution, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); see National District Attorneys Association, NATIONAL PROSECUTION STANDARDS, Standard 9.4(A) ("The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial"), so the probable cause standard is no obstacle to proper governmental action. It is the express standard established in the Fourth Amendment and it is implicit in the Grand Jury Clause of the Fifth Amendment.

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unless the officer acted not only without probable cause but without an objectively reasonable belief in probable cause.

In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court explained:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities.
>
> These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." . . . And, this "means less than evidence which would justify condemnation" or conviction. . . . Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. . . .
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But, the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

> accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officers' whim or caprice.

Id. at 175-176; see also, *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court elaborated that probable cause is a "common sense" standard that should be judged according to the totality of the circumstances. *Id.* at 230. "Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232.

The Constitution requires that the probable cause standard must be satisfied before an arrest or search without a warrant may be made, before an arrest or search warrant may issue, and "as a prerequisite" to detention pending prosecution. *Gerstein v. Pugh*, 420 U.S. 103, 111-112, 120, 126 (1975). It is even more appropriate for the more considered and more consequential action to initiate a formal criminal prosecution.

The Fifth Amendment Grand Jury Clause provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . . " Enforcing the probable cause standard has enabled the grand jury to serve "as a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra* 414 U.S. 338, 343 (1974). In *Hurtado v. California*, 110 U.S. 516

(1884), this Court held that the Fifth Amendment provision for grand jury indictment was not a requirement of procedural due process. It did so, however, in the course of reviewing a California procedure for prosecution by information that included a review of the basis for the prosecution by a magistrate who would uphold it only "if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof." *Id.* at 517.

In upholding the prosecution without the grand jury procedure, the Court made clear that due process permits that result only in light of the fact that California had an alternative procedure for "certifying to the *probable guilt* of the defendant." *Id.* at 538 (emphasis added). Thus, the opinion assumed, if it did not hold, that probable cause is the due process standard for a prosecution, though the grand jury procedure is not constitutionally required to enforce that standard.[11]

Decisions following *Hurtado* reviewed cases after they had resulted in criminal convictions and the opinions did not enter into any discussion of the probable cause standard. E.g., *Bolln v. Nebraska*, 176 U.S. 83, 86 (1900); *Hodgson v. Vermont*, 168 U.S. 262, 272 (1897); *Dowdell v. United States*, 221 U.S. 325, 332 (1911). Later, in *Lem*

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[11] *Hurtado* rests on an assumption that any procedure adopted by the states to replace the grand jury would perform an equivalent function . . . and that, therefore, prosecution without probable cause would violate Fourteenth Amendment due process rights."
Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, 258 (5th Cir. 1984).

Woon v. Oregon, 229 U.S. 586, 590 (1913), the Court held that the preliminary hearing procedure also is not obligatory upon the states as part of due process. In *Lem Woon*, the defendant had been convicted of murder, so there was no question before the Court about probable cause for the prosecution and the Court did not address the subject.[12] Certainly none of these cases suggested that due process would permit a prosecution to proceed without probable cause. Their concern was exclusively procedural, not substantive, due process.

Thus, though the Constitution does not confine the states to the procedure of the grand jury or dictate to the states the alternative procedure of the preliminary hearing, the core value of the Fifth Amendment Grand Jury Clause that the initiation of a criminal prosecution be based only on probable cause is essential to due process. The states may enjoy flexibility in developing the procedures to enforce that standard within their criminal justice system, yet may not permit prosecutions to proceed with the full force of governmental power without a factual foundation justifying that action that amounts at least to probable cause.

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[12] In *Ocampo v. United States*, 234 U.S. 91, 98 (1914), the Court applied *Hurtado* and *Lem Woon* to the Philippines, in an opinion emphasizing that the law of the territory required probable cause for an information.

II.

SECTION 1983 PROVIDES A REMEDY AGAINST A LAW ENFORCEMENT OFFICER WHO INITIATES AND PURSUES A CRIMINAL PROSECUTION WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

A.

SECTION 1983 PROVIDES A REMEDY FOR ABUSES OF STATE POWER THAT VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Monroe v. Pape*, 365 U.S. 167, 172 (1961), this Court held that Congress intended §1983 "to give a remedy to parties deprived of constitutional rights . . . by an official's abuse of his position." Section 1983 provides an effective remedy only for a violation of " 'federally protected rights' ", *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980), and "it does not purport to supplant ordinary tort law." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). "Our Constitution deals with the large concerns of the governors and the governed. . . . " *Daniels v. Williams*, *supra*, 474 U.S. at 332. Hence, to establish a §1983 claim a complaint must allege two elements – "and only two" – beyond traditional tort

allegations: first, that the plaintiff's harm was caused by a constitutional violation; secondly, that the defendant responsible for that violation was acting under color of state law. *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1066 (1992); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); see *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 61 L.W. 4205 (1993).[13]

Because §1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by" the Constitution, *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979), "[t]he first inquiry in any §1983 suit" is "to isolate the precise constitutional violation." *Id*, 140; *Graham v. Connor*, 490 U.S. 386, 394 (1989). In the present case, the constitutional right at stake is the substantive due process right to be free from a prosecution except on probable cause, as described in Argument I. In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), this Court assumed that §1983 provides a remedy for a deprivation of constitutional rights "in initiating and pursuing a criminal prosecution." The holding in *Imbler* was that "in initiating a prosecution and in presenting the state's

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[13] The complaint in this case pleaded facts that satisfy the objective reasonableness standard as well as the probable cause standard thus satisfying the requirement that plaintiff's harm be caused by a constitutional violation. Cf. *Leatherman, supra*, 61 L.W. at 4206. See also Argument, pp. 36-38, *infra*, and n.18.

case, the prosecutor is immune from a civil suit for damages under §1983." *Id*. In its discussion, the Court assumed that without absolute immunity a prosecutor could be liable in an action under §1983 challenging "his decision to initiate a prosecution." *Id*. at 421, 424-425, 427. The Court observed: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Id*. at 427.

The *Imbler* assumption was, of course, correct. Section 1983 provides a remedy "against those abuses of state power that violate federal law." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1065 (1992). As long as the prosecution was undertaken under color of law and deprived the plaintiff of the constitutional right to be free from prosecution except on probable cause, the elements of a §1983 claim are satisfied. *Soldal v. Cook County, Illinois*, 113 S.Ct. 538, 549 (1992); *Collins v. City of Harker Heights, supra; Gomez v. Toledo, supra*. Although a prosecutor enjoys the protection of absolute immunity from such an action, a law enforcement officer or other public official is protected only by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The substantive due process liberty interest in freedom from a baseless prosecution does not enjoy any procedural safeguards as a matter of federal constitutional imperative against the states. A judicial "probable cause determination is not a constitutional prerequisite to the charging decision" except "for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 119, 125 n.26 (1975). No grand jury or preliminary hearing

review of the existence of probable cause is constitutionally required. *Hurtado v. California, supra; Lem Woon v. Oregon, supra.* The trial provides an ultimate procedure for the accused to test the basis for the prosecution but it tests whether the prosecution at the time of trial was supported by proof beyond a reasonable doubt, *In re Winship, supra,* and does not test whether the prosecution was initiated on the basis of probable cause.

Whether the prosecution is dismissed before trial or the accused is acquitted after trial, a §1983 action provides the only remedy for the constitutional violation in the initiation and pursuit of the action without an adequate constitutional basis.[14] It is necessary to deter as well as to remedy the constitutional violation.[15] "When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' " *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). "A 'damages remedy against the

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[14] The remedy under §1983 may, only upon a "showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief," include an injunction against the groundless prosecution. *Younger v. Harris,* 401 U.S. 37, 54 (1971); see *Kugler v. Helfant,* 421 U.S. 117, 124 (1975); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611 (1975); *Gibson v. Berryhill,* 411 U.S. 564, 573-574 (1973); *Mitchum v. Foster,* 407 U.S. 225, 230 (1972); see also *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972).

[15] In the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy – the person who in fact has done no wrong, and has been [prosecuted] for no reason, or a bad reason." *Malley v. Briggs, supra,* 475 U.S. at 344.

offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez v. Toledo,* 446 U.S. 635, 639 (1980).

B.

A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE IS A CONSTITUTIONAL VIOLATION AND SO A BASIS FOR A SECTION 1983 ACTION THOUGH POLICE DISTRIBUTION OF A DEFAMATORY FLYER IS NOT.

The Seventh Circuit in the decision below relied on *Paul v. Davis,* 424 U.S. 693 (1976), to hold that a prosecution without probable cause constitutes a constitutional tort only if the prosecution renders the plaintiff unemployable, subjects him to jail, or forces him to stand trial. 975 F.2d at 346. The Seventh Circuit explained:

> We do not place malicious prosecution in the class of trifling infringements of the rights to be free from oppression by public officers; but in the absence of incarceration or other palpable consequences we do not think it should be actionable as a constitutional wrong. In a case such as this, where the prosecution collapses before trial, just as in the garden-variety public-officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate. . . .

Id. at 347.

In *Paul v. Davis,* two police departments circulated to local businesses a flyer containing the names and photographs of persons arrested for or "known to be active in" shoplifting, including Davis. Davis was charged with

shoplifting at the time but the charge was later dismissed.[16] The flyer came to the attention of the newspaper where he worked as a photographer, and he was given a warning but was not discharged or disciplined.

This Court held that Davis' allegations of defamation by the police departments, "standing alone and apart from any other governmental action with respect to him," did not state "a claim for relief under 42 U.S.C. §1983 and the Fourteenth Amendment." 424 U.S. at 694. The Court emphasized that Davis "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." 424 U.S. at 700. The Court suggested that although Davis' loss of reputation was not "a deprivation of liberty within the meaning of the Due Process Clause," 424 U.S. at 702, had the police action caused Davis to lose "some more tangible interests such as employment," 424 U.S. at 701, or "government employment," 424 U.S. at 706, §1983 would have afforded a remedy. Accord, *Siegert v. Gilley*, 111 S.Ct. 1789, 1794 (1991).

By contrast, Petitioner does "identify a specific constitutional guarantee safeguarding the interest he asserts has been invaded": the substantive due process freedom from prosecution except upon probable cause. Unlike the police distribution of a flyer about which Davis complained, Petitioner directs his action against the formal, official, and solemn action by a law enforcement officer of initiating and pursuing a criminal action against him.

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[16] The Court's opinion does not suggest that Davis ever contended that there was not probable cause for the shoplifting charge.

Not "every infringement of an interest protected at common law" is a deprivation of a constitutionally protected liberty. 975 F.2d at 346; *Paul v. Davis, supra*, 424 U.S. at 699. All torts of state officials are not constitutional torts, *id.* at 700-701; *Parrat v. Taylor*, 451 U.S. 527, 544 (1981), and all defamations by public officials are not constitutional torts. *Paul v. Davis, supra*, 424 U.S. at 702. Formally invoking the criminal justice process of the state against an individual without an objectively reasonable belief in probable cause to do so by an official, however, is, as explained in Argument I, the paradigm of arbitrariness and oppression in the abuse of governmental power. Such severe governmental action wrongfully employed is itself sufficient to constitute a constitutional violation that is a basis for a §1983 action. A groundless police investigation or surveillance may cause injury to its target, but if no constitutional right is violated that person has no more §1983 claim that did Davis. A criminal prosecution subjects a person to a qualitatively different governmental exercise of power than the distribution of a defamatory flyer.

Section 1983 does not, of course, provide a remedy for a *de minimis* violation, such as a harmless push or shove. *Hudson v. McMillian*, 112 S.Ct. 995, 996 (1992); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). A groundless criminal prosecution of a citizen can never be of that *de minimis* character. This Court has frequently found a constitutionally significant distinction between police investigation and formal prosecution. *United States v. Loud Hawk*, 474 U.S. 302, 310-312 (1986); see also *Doggett v. United States*, 112 S.Ct. 2686, 2693 (1992); *United States v. MacDonald*, 456 U.S. 1, 9 (1982); *United States v. Lovasco*,

431 U.S. 783, 791 (1977); *Dillingham v. United States*, 423 U.S. 64, 64-65 (1975); *United States v. Marion*, 404 U.S. 307, 313 (1971); *Kirby v. Illinois, supra*, 406 U.S. at 689-690.

The filing of a formal charge is a significant governmental action that crosses a threshold that can no longer be harmless. That action implicates a person's interest in reputation, to be sure, but far more it implicates the fundamental liberty interest in freedom from a groundless prosecution. That prosecution may be the cause of many consequences, and they may be devastating, but it is the deprivation of the freedom from prosecution except upon probable cause that is the gravamen of the constitutional violation and the basis for the constitutional tort. The constitutional violation and the constitutional tort are complete upon the formal filing of the criminal charge without probable cause. The collateral consequences that may result – pre-trial detention, loss of employment, expense, anxiety, loss of friends public obloquy – are factors in aggravation. If the prosecution collapses before trial, the wrong is mitigated, but it does not vanish. Petitioner may recover for "out-of-pocket loss and other monetary harms" as well as "such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' " *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986). Incarceration, loss of employment, and a full trial would all be factors in aggravation. None is necessary, however, as the constitutional wrong is the filing of the groundless criminal prosecution itself.

All of the Courts of Appeals agree that a groundless prosecution in some form is actionable under §1983. See cases cited in footnote 7, *supra*; see also *Smith v. Gonzales*,

459 U.S. 1005, 1007 (1982) (White, J., dissenting from denial of cert.) ("Section 1983 actions for wrongful arrest and prosecution are frequently brought against police officers"). The Ninth Circuit requires an intent to deprive the accused of equal protection, such as a racial motivation, *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988), and the Eighth Circuit requires some constitutional infringement. *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). With a clear ruling establishing the substantive due process right to freedom from criminal prosecution except upon probable cause, these reservations would be unnecessary.

Other courts insist that the groundless prosecution must be "egregious." *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Dunn v. Tennessee*, 697 F.2d 121, 122 (6th Cir. 1982). Like the Seventh, Eighth and Ninth circuits, these courts seems to be searching for some way to assure that §1983 will be used to remedy only a violation of "constitutional dimension" and not a " 'garden-variety,' " *Soldal v. Cook County, supra*, 113 S.Ct. at 549 (1992), state law tort that happens to be committed by a public official. The formal filing of a criminal charge, however, invokes a uniquely governmental and severe power over the individual that therefore enjoys substantive protection of the Due Process Clause. There is no need for aggravation to elevate the violation to a constitutional dimension. *Soldal v. Cook County, supra*, 113 S.Ct. at 548. Baselessly charging a person with crime – not informally by flyer – but formally by process is sufficient without more to constitute the violation for it plainly implicates the interests protected by the Due Process Clause.

C.

BY OPERATION OF THE DEFENSE OF QUALIFIED IMMUNITY A LAW ENFORCEMENT OFFICER WOULD BE LIABLE UNDER SECTION 1983 ONLY IF THE OFFICER INITIATES OR PURSUES A CRIMINAL PROSECUTION NOT ONLY WITHOUT PROBABLE CAUSE BUT ALSO WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

As discussed in Part I(B), the probable standard is both flexible and minimal. A law enforcement officer sued for damages under §1983, however, would be eligible for qualified immunity from suit. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gomez v. Toledo, supra*. Consequently, a law enforcement officer will be answerable for damages under §1983 only if the officer did not have probable cause for a prosecution and no reasonably well-trained officer could have believed he had probable cause. See *Malley v. Briggs, supra*, 475 U.S. at 344-345; *Hunter v. Bryant*, 112 S.Ct. 534 (1991); *Franks v. Delaware*, 438 U.S. 154, 164-165, 171 (1978) (a material deliberate or reckless falsehood by a law enforcement officer may not be considered in establishing probable cause). An officer who files a criminal charge without probable cause and without an objectively reasonable belief in probable cause has committed a constitutional violation of a grave character. No requirement of another constitutional violation, an egregious factor, or a special kind of additional injury is necessary or appropriate.

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs, supra*, 475 U.S. at 341; see also *Anderson v.*

Creighton, supra 483 U.S. at 641. In the context of taking action to initiate a criminal prosecution, the objective reasonableness standard would "shield[ ] [the officer] from suit for damages if 'a reasonable officer could have believed [the person's] prosecution to be lawful in light of clearly established law and the information the officer[ ] possessed.' " *Hunter v. Bryant, supra*, 112 S.Ct. at 536. No higher standard, such as malice, is required as the action of initiating a criminal prosecution – unlike, for example, the action of making an arrest – need never be made in an "emergency situation" or " 'in haste, under pressure.' " *Wilson v. Seiter*, 111 S.Ct. 2321, 2326 (1991).[17] On the other hand, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Malley v. Briggs, supra*, 475 U.S. at 341.[18]

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[17] Compare *Graham v. Connor*, 490 U.S. 386, 399 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances and subjective concepts like 'malicious' and 'sadism' have no proper place in that inquiry.")

[18] If the prosecutor reviews the information presented by the officer prior to charges being filed, the officer is liable only if the information the officer provides the prosecutor upon which the prosecutor acts is information "no officer of reasonable competence [could] have [submitted to the prosecutor]. . . . " *Malley v. Briggs, supra*, 475 U.S. at 346 n.9. Causation exists because "§1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' " *Malley v. Briggs, supra*, 475 U.S. at 344 n.7.

D.

BECAUSE THE CONSTITUTIONAL VIOLATION CONSISTS OF A VIOLATION OF SUBSTANTIVE, RATHER THAN PROCEDURAL DUE PROCESS, THE SECTION 1983 FEDERAL REMEDY IS AVAILABLE REGARDLESS OF WHETHER THE STATE ALSO PROVIDES A TORT REMEDY.

The Seventh Circuit in the decision below said that the state malicious prosecution remedy "should be adequate and the heavy machinery of constitutional litigation can best be left at rest." *Albright v. Oliver*, 975 F.2d at 347. In *Monroe v. Pape*, 365 U.S. 167 (1961), however, this Court held:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.

Id. at 183. The Court noted that the federal remedy is necessary where the state law may be inadequate in theory or unavailable in practice, but no showing of such condition is prerequisite to an action under §1983. *Id.* at 173-174.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180. As the Court later confirmed:

> We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. The first Congress created federal courts as the chief – though not always the exclusive – tribunals for enforcement of federal rights.

McNeese v. Board of Education, 373 U.S. 668, 672 (1963); see also *id.* at 674 ("It is immaterial whether respondents' conduct is legal or illegal as a matter of state law.") "Thus overlapping state remedies are generally irrelevant to the existence of a cause of action under §1983." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990).

Where the constitutional violation consists of a deprivation of procedural, rather than substantive, due process, however, this Court has "recognized that postdeprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 538 (1981). " 'The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." ' " *Id.* at 540 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974)).

In *Parratt*, the plaintiff was a state prisoner who sued to recover the value of hobby materials that he had ordered by mail and that prison officials had lost. 451 U.S. at 529. The State provided a tort claims procedure. *Id.* at 543. The Court held this remedy "sufficient to satisfy the requirements of due process." *Id.* at 544. The Court distinguished *Monroe, supra* and *Estelle v. Gamble* as

involving specific Fourth and Eighth Amendment violations. The Court suggested that the difference is that the Fourth and Eighth Amendments identify particular rights while the prisoner in *Parratt* relied on no right "other than the Due Process Clause of the Fourteenth Amendment *simpliciter*." *Id.* at 536.

The Fourth and Eighth Amendment claims apply to the states only through the Due Process Clause of the Fourteenth Amendment, however, and §1983 provides a remedy for all constitutional violations under color of state law. Thus, the Court must have had in mind a more significant difference. Constitutional rights receive different treatment in accordance with the interest they protect and the character of their protection, not simply their location or source in the Constitution. Cf. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Soldal v. Cook County*, 113 S.Ct. at 548.

The distinction the Court drew was between *substantive* and *procedural* due process claims. See *Daniels v. Williams, supra*, 474 U.S. at 337-338 (Stevens, J., concurring); *Hudson v. Palmer*, 468 U.S. 517, 541 n.4 (1984) (Stevens, with Brennan, Marshall and Blackmun, JJ, concurring and dissenting); *Parratt v. Taylor, supra*, 451 U.S. at 545 (Blackmun, with White, J., concurring), 552-553 (Powell, J., concurring); see also *Ingraham v. Wright, supra* 430 U.S. at 679 n.47. The Court in *Parratt* identified the constitutional wrong before it as the denial of a predeprivation hearing, 451 U.S. at 537, a denial of *procedural* due process. It held that in the circumstances of the case before it the requirements of procedural due process would forgive the denial of a predeprivation hearing as long as the State provided a postdeprivation hearing. 451 U.S. at

538.[19] As long as adequate procedure is still available, no denial of procedural due process has occurred and so

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[19] All of the cases upon which the Court relied for this point, 451 U.S at 538-539, involved procedural due process claims with regard to deprivations of personal property rather than personal liberty. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Ewing v. Mytinger & Casselbery, Inc.*, 339 U.S. 594 (1950) (seizure of drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (bank seizure); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control orders); *Corn Exchange Bank v. Coler*, 280 U.S. 218 (1930) (assessment of bank shareholders); *McKay v. McInnes*, 279 U.S. 820 (1929) (same); *Ownbey v. Morgan*, 256 U.S. 94 (1921) (same); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (pre-adjudication sequestration of property with disputed ownership); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (IRS summary proceeding to collect taxes from stockholder transferees); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (adoption; denial of notice to father of hearing denies procedural due process despite availability of postdeprivation hearing on motion to set aside decree). "Where only property rights are involved," the Court wrote for example in *Phillips v. Commissioner*, 283 U.S. 589 (1931), "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.* at 596-597. *Parratt*, therefore, said that it is only "takings of property" that it would uphold "without any predeprivation process." 451 U.S. at 541; see also *Hudson v. Palmer, supra*, 468 U.S. 517, 530 (1984); but *see, Ingraham v. Wright*, 430 U.S. 641, 682 (1977) (hearing not required before corporal punishment of student).

In *Lynch v. Household Finance Corp*, 405 U.S. 538 (1972), the Court rejected any "distinction between personal liberties and proprietary rights as a guide to [28 U.S.C.] §1343 (3) jurisdiction," the jurisdictional counterpart to §1983. Of course, "rights in property are basic civil rights." *Id.* at 552. The nature of property rights, however, renders them more readily amenable to procedural due process "at some time after the initial taking," *Parratt v. Taylor*, 451 U.S. at 539, in appropriate circumstances, than rights in personal liberty.

there is no occasion for §1983 to entertain a lawsuit for a constitutional tort.

A procedural violation is complete only if there is not another adequate procedure still available. All *Parratt* held is that in such a case there is yet no constitutional violation: procedural due process is still available. *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990). If no other procedure is still available, or if it is inadequate – in some cases, for example, because it is postdeprivation, e.g., *Connecticut v. Doehr*, 111 S.Ct. 2105, 2115-2116 (1991); (prejudgment attachment of real estate); *Zinermon v. Burch*, 493 U.S. 113 (1990) (civil commitment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license and registration); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Sniadach v. Family Finance Corp*, 395 U.S. 337 (1969) (wage garnishment) – even a procedural due process violation is then complete.

Where the constitutional wrong consists of a deprivation of *substantive* rather than procedural due process, however, the violation is complete at the time of the

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This point is illustrated in the Court's recent decision in *Zinermon v. Burch* 494 U.S. 113 (1990). In *Zinermon*, the Court held that "the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule." *Id.* at 132. The Court proceeded, however, to hold that the availability of a postdeprivation damages remedy, *id.* at 130 n.15, did not preclude a §1983 action for a denial of procedural due process for a civil commitment without a hearing of a person allegedly incompetent to consent to voluntary admission. *Id.* at 136-139.

initial deprivation. Because the violation is not procedural, no procedure can correct it or cause it to disappear.[20] An unconstitutional arrest is actionable under §1983 though a *Gerstein v. Pugh* state judicial review may halt the violation and state tort law may provide for damages. *Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990). An unconstitutional search is actionable under §1983 though a state court may later order return of all property taken. *Id.; Soldal v. Cook County*, 113 S.Ct. 538 (1992). An unconstitutional police beating or shooting is actionable under §1983 though a state tort remedy may be available. *Graham v. Connor, supra; Tennessee v. Garner*, 471 U.S. 1 (1985). And, an unconstitutional criminal prosecution is actionable under §1983 though a preliminary or grand jury proceeding may conclude the unconstitutional proceeding, though a trial may bring a measure of vindication, and though the state has a malicious prosecution action through which the injured party might sue for damages. Procedure cannot correct a substantive due process violation, though procedure may mitigate the injury from the violation.

A state malicious prosecution action does not purport to be part of the process of the criminal charging decision. By its elements – especially the customary element that the action must have terminated in favor of the plaintiff – malicious prosecution lies only when the

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[20] Petitioner did receive a preliminary hearing that failed to halt the baseless prosecution. Had it done so, however, such action would not have divested his §1983 claim, only mitigated the injury.

wrong is complete. If the wrong is of constitutional quality – meaning only that it consisted of an official under color of state law instituting a criminal prosecution without probable cause (and without an objectively reasonable belief in probable cause) – it is at that point a complete basis for the §1983 action.

Even a dismissal of the criminal prosecution or an acquittal does not vanquish the violation. If the prosecution was baseless, the criminal defendant has still suffered a loss of a constitutional right. Indeed, such a termination in favor of the defendant should be a prerequisite to a §1983 action, as it is generally to a malicious prosecution action, on a *res judicata* theory or an abstention theory under *Younger v. Harris*. See footnote 14, *supra*.

Congress enacted §1983 as a primary federal remedy for constitutional violations. Congress has not conditioned §1983 on a showing of the unavailability or inadequacy of state remedies. Congress has required prior resort to state remedies only in the limited area of prisoner grievance procedures that have received appropriate certification. 42 U.S.C. §1997(e). In cases involving deprivations of procedural rights, generally involving property rights, the availability of state postdeprivation remedies might in appropriate circumstances correct any constitutional deficiency. Where the constitutional violation is substantive in nature and so complete without reference to any procedure that might be required, once it has occurred the violation cannot be corrected by the provision of any form of procedure, and the §1983 remedy is available without regard to state remedies. Where the constitutional violation consists of initiating a criminal proceeding without an objectively reasonable belief that

it is warranted even by the minimal probable cause standard, such an arbitrary abuse of a severe and uniquely governmental power under color of state authority is a reasonable concern of §1983.[21]

The Court is properly concerned to prevent trivialization of §1983, which was designed to remedy fundamental constitutional violations, "to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1070 (1992); see also, *Parratt v. Taylor, supra*, 451 U.S at 544. That the state may also provide a tort remedy in the form of a malicious prosecution action does not necessarily mean that §1983 would be called into service for a "fairly typical state law claim" that happens to be committed by a state official. *Id.*; see also, *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 202 (1989). On the contrary, it would be employed to serve the substantive due process interest in protecting a right to freedom from prosecution except upon probable cause that is implicit in the concept of ordered liberty. The §1983 action, unlike a malicious prosecution tort action, arises only in the case of a criminal prosecution and only where the wrongful character of the prosecution has a constitutional dimension, that because it was lacking in probable cause it constituted an arbitrary abuse of governmental power. That is the constitutional violation for the §1983 tort action; no other constitutional violation is necessary and

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[21] Because the violation is substantive rather than procedural in character and complete despite the availability of a state postdeprivation tort remedy, there is no need to consider the rationale of *Zinermon, supra*, 494 U.S. at 136-138.

no aggravating or egregious features are required. If an officer initiates a criminal prosecution without an objectively reasonable basis, that is itself an abuse of governmental power.

CONCLUSION

For the foregoing reasons, the judgment affirming the dismissal of the complaint for failure to state a §1983 claim should be reversed, and the case should be remanded for further proceedings on the §1983 claim.

Respectfully submitted,

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